

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NEIL R. STEIN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, San Diego, Calif.

*Docket No. 96-324; Submitted on the Record;
Issued March 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in reducing the requested fee of appellant's attorney to \$5,008.75.

By letter dated October 26, 1994, which was accompanied by an itemized statement, Max Gest, Esquire, of Los Angeles, California, appellant's representative before the Office, requested approval by the Office of a fee in the amount of \$7,705.75 for 23.71 hours of work performed from December 10, 1991 through October 7, 1994 at a billing rate of \$325.00 per hour.

By letter dated November 14, 1994, appellant stated that Mr. Gest was no longer his attorney as of October 7, 1994 and had overcharged him more than \$3,700.00. Appellant provided a detailed review of the itemized bill submitted and commented that Mr. Gest had padded his billing time to increase the total number of hours charged, had overcharged for standard transmittal letters and brief telephone calls, had requested an unreasonable rate of \$325.00 per hour and had billed for a "free" initial consultation. Appellant stated that he would not pay Mr. Gest more than \$4,000.00 for his services.

In a decision dated September 7, 1995, the Office approved a fee of \$5,008.75 for services rendered from January 14, 1992 to October 7, 1994. The Office stated that the initial retainer agreement signed on December 10, 1991, specified a minimum charge of \$125.00 per hour and that the accepted charge in the pertinent area "at this time" was \$325.00. However, the Office was not approving that rate in 1991-93 and, accordingly, reduced the requested hourly rate to \$175.00 in 1992, \$250.00 in 1993 and the full charge of \$325.00 in 1994.

In its decision, the Office reviewed each of appellant's myriad objections to Mr. Gest's hourly charges on specific dates. The Office permitted no fee for the initial consultation on December 10, 1991 and reduced the time charged on 36 of the 63 billed services, including 20 one-third hour charges cut to one-quarter hour or less. The Office noted that the reductions were

based on appellant's statement of the amount of time involved, such as five-minute telephone calls, or what appeared to be reasonable for drafting brief cover letters.

The Board finds that this case is not in posture for decision, because the Office abused its discretion in not providing Mr. Gest with a copy of appellant's objections and by not permitting Mr. Gest to comment on those objections as well as the reduced hourly rate.

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before the Office.¹ That function is within the discretion of the Office based on the criteria set forth in section 10.145.² The Board's sole function is to determine whether the Office's award of the attorney's fee constituted an abuse of discretion.³

The Board has frequently stated that it will not interfere with or set aside a fee decision, by the Office unless the evidence of record demonstrates, that the Office abused its discretion.⁴ Generally, an abuse of discretion can be shown only through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁵

Section 10.145(d) provides that the attorney shall arrange for his client to review the fee request and comment on the services rendered and the reasonableness of the fee. The regulation adds that the client's written comments "should accompany" the fee application.⁶ The Federal (FECA) Procedure Manual states that any fee request should include an opinion, from the client on the reasonableness and appropriateness of the fee requested. Thus, the attorney must show the client the entire fee application, including the itemized list of services.⁷

In this case, Mr. Gest argues that the Office abused its discretion because, despite his repeated requests, it failed to provide him with a copy of appellant's comments on his fee application, thereby precluding him from rebutting appellant's contentions. The record indicates that appellant submitted directly to the Office his detailed statement objecting to the hourly rate

¹ See *Edna M. Davis*, 42 ECAB 728, 734 (1991).

² 20 C.F.R. § 10.145(b) provides the following criteria for approval of representative fees: "(b) the fee approved by the Office will be determined on the basis of the actual necessary work performed and will generally include but are not limited to the following factors: (1) Usefulness of the representative's services to the claimant; (2) The nature and complexity of the claim; (3) The actual time spent on development and presentation of the claim; (4) The amount of compensation accrued and potential future payments; (5) Customary local charges for similar services; and (6) Professional qualifications of the representative."

³ *Regina G. Jackson*, 41 ECAB 321, 325 (1989).

⁴ *John E. Harman*, 41 ECAB 169, 174 (1989).

⁵ *Daniel J. Perea*, 42 ECAB 214, 220 (1990).

⁶ 20 C.F.R. § 10.145(d).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200.5(a) (December 1994).

charged by Mr. Gest and to the length of time spent for many of the services performed by Mr. Gest.

The record also indicates that Mr. Gest wrote to the Office, on numerous occasions requesting that he be sent a copy of appellant's November 14, 1994 letter, disputing the amount of the fee. Mr. Gest first requested a copy of appellant's letter on October 26, 1994. He reiterated his request on January 19, March 2, April 14, May 19 and June 21, 1995.

Because appellant has accused Mr. Gest of "padding" his billing, time after appellant's claim was approved in July 1993 and because Mr. Gest has had no opportunity to comment on appellant's specific objections to legal services rendered, the Board finds that the Office abused its discretion in failing to provide Mr. Gest with a copy of appellant's November 14, 1994 letter, disagreeing with Mr. Gest's charges.⁸

Further, the Board finds that the Office abused its discretion in reducing Mr. Gest's requested hourly rate, without permitting him to comment on the lower rates determined for 1992 and 1993. The Office found that the case, was "fairly complex" and that Mr. Gest was a specialist in his field. However, based on its conclusions that hourly "rates rise over the course of time" and that it was not "approving" \$325.00 an hour in 1992 and 1993, the Office determined that the \$325.00 charge was "unreasonable."

The procedure manual instructs that the Office should consider the customary charges, for similar services in the attorney's locality and that this information should be requested from local bar associations, state compensation boards and any other appropriate sources.⁹ The record does not indicate that the Office requested any information about customary charges in Mr. Gest's area -- the Office simply relied on its past practice, contrary to its procedures.

Inasmuch as the Office abused its discretion, in failing to provide Mr. Gest with a copy of appellant's letter, objecting to his fee request and to permit Mr. Gest to comment on the reduced hourly rate, the Board will set aside the September 8, 1995 decision and remand this case for further proceeding consistent with this opinion.¹⁰

⁸ See *Woodrow W. London*, 33 ECAB 610, 612 (1982) and cases cited therein; see also *Rosa M. Thomas-Hunter*, 42 ECAB 500, 504 (1991) (noting that an attorney has broad latitude in exercising his professional judgment during preparation of his client's case and has the responsibility to study and research those matters which, in his professional opinion, might further his client's case; such work, within reasonable bounds, is entitled to consideration in fixing the fee, even though all the work may not prove helpful in producing relevant evidence or legal precedent).

⁹ Federal (FEC A) Procedure Manual, Part 2 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200.6(b)(8) (December 1994).

¹⁰ See *John E. Harman*, *supra* note 4 at 175 (remanding the case because the Office abused its discretion in approving an hourly rate without first considering local charges for similar services).

The September 7, 1995 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further development and a *de novo* decision.

Dated, Washington, D.C.
March 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member